

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

IN RE	:	
GARRY KLINGER,	:	
Debtor,	:	
	:	
GARRY KLINGER,	:	
Appellant,	:	
	:	
v.	:	Civil Action No. 3:01CV2311(CFD)
	:	
CAROLYN SCHWARTZ,	:	
United States Trustee,	:	
and	:	
BARBARA KATZ,	:	
Trustee,	:	
Appellees.	:	

RULING

Pro se appellant Garry Klinger (“Klinger”) appeals a November 15, 2001 order of United States Bankruptcy Judge Lorraine Murphy Weil converting the above-captioned case from Chapter 11 to Chapter 7 of the United States Bankruptcy Code. Shortly thereafter, Klinger sought a stay of the conversion order in the bankruptcy court, and Judge Weil denied his motion orally on November 26, 2001 followed by a written decision of November 27, 2001. Klinger then filed a notice of appeal of the conversion order on December 11, 2001 and filed at least one motion seeking a stay of Judge Weil’s order with this Court. On January 25, 2002, this Court denied the motion [Doc. # 3] on the basis that Klinger had not demonstrated that he first sought a stay in the bankruptcy court.¹ Klinger has filed a timely motion to reconsider that ruling. In

¹Klinger also submitted a “Motion for IMMEDIATE RELIEF” dated January 9, 2002, which was attached to a document entitled “Notice of Appeal,” dated January 5, 2002. In the latter motion, Klinger appears to request that this Court stay all orders entered by Judge Weil, which would presumably encompass the conversion order. For the same reasons explained above,

addition, the trustee appointed to administer the Chapter 7 estate, Barbara H. Katz (“Katz” or “the trustee”), has filed a motion to dismiss this appeal.

The Court notes that the nature of the bankruptcy estate is not entirely clear from the filings in this case. It appears that Klinger operated a real estate company that owned several properties currently being leased by various tenants. As Klinger himself describes, he “owns 16 condominiums and 11 single family homes he holds out for rent. Because of a myriad of financial problems relevant to these properties and 8 foreclosures looming appellant filed under chapter 11 to re-organize.” Doc. # 5, Memorandum Brief of Appellant, Feb. 8, 2002, at 1.

I. Klinger’s motion for reconsideration of the stay [Doc. # 4]

A party seeking a stay in a district court of a bankruptcy court ruling first must demonstrate that he sought a stay from the bankruptcy court. See Fed. R. Bankr. P. 8005. Klinger did not attempt to make this showing in his original motion to stay [Doc. # 3] and the Court denied his motion on this basis. In his motion for reconsideration, Klinger refers to the copy of the bankruptcy docket attached to the file as evidence that he first requested that Judge Weil stay the conversion order. In addition, the trustee attached a copy of the bankruptcy court’s decision on the motion to stay to its motion to dismiss. Given this new information, Klinger’s motion for reconsideration is GRANTED, and the Court will consider the merits of the motion.

Rule 8005 of the Federal Rules of Bankruptcy Procedure, which sets forth the requirements for parties seeking a stay pending appeal of a bankruptcy decision, is interpreted consistently with Rule 62 of the Federal Rules of Civil Procedure. In re Miller, 263 B.R. 183, 185 (N.D.N.Y. 2001). To obtain a stay pending appeal, the debtor must show: (1) a substantial

this motion is DENIED.

possibility, but less than a likelihood, of success on the merits of the appeal; (2) that the movant will suffer irreparable injury if the stay is denied; (3) that no substantial harm will be suffered by others if the stay is granted; and (4) that the stay is in the public's interest. In re Country Squire Assoc. of Carle Place, L.P., 203 B.R. 182, 183 (2nd Cir. BAP 1996); Hirschfeld v. Board of Elections, 984 F.2d 35, 40-41 (2d Cir.1993); In re Boagdanovich, No.00Civ.2266(JGK), 2000 WL 1708163, at *3 (S.D.N.Y. Nov. 14, 2000); In re Holtmeyer, 229 B.R. 579, 582 (E.D.N.Y. 1999).² “The test requires that before a stay may be granted, the balance of the hardships must favor the movant.” In re Altman, 230 B.R. 17, 18-19 (Bankr. D. Conn. 1999).

“A showing of probable irreparable harm is the principal prerequisite for the issuance of a stay. Under that test, the moving party must demonstrate that such injury is likely before the other requirements will be considered.” Id. at 19 (quoting In re City Bridgeport, 132 B.R. 81, 83 (Bankr. D. Conn. 1991)). The moving party also is required to show that injury is imminent and not remote or speculative. Id. Klinger maintains in his “Addendum to Motion for Stay of Conversion Order” that Katz is destroying the bankruptcy estate by collecting rents from his tenants and selling certain properties.³ However, “the appointment of a trustee does not constitute an irreparable injury or indeed any injury at all because a trustee’s powers are essentially equivalent to those of a debtor in possession, i.e., any trustee appointed in this case has

²Some of these cases articulate a higher standard for the first prong—a strong likelihood of success on the merits. Just as in In re Country Squire Associates, however, neither standard is satisfied here. See 203 B.R. at 183 n. 1.

³In support of his motion for reconsideration, Klinger attached a copy of a grievance and civil complaint that he filed against Katz and Stephen Mackey (“Machey”), the attorney for the United States Trustee. Katz and Mackey represented at the hearing before this Court that neither action remains pending.

the fiduciary duty to maximize the estate for distribution to creditors.” Id. Therefore, there is no irreparable injury apparent either from Katz’s status or from her activities to date. Given appellant’s pro se status, the Court also will consider the other relevant factors.

Klinger has not demonstrated a substantial possibility of success on the merits of his appeal, principally because he has not provided the Court with a sufficient record on which to base a determination in his favor. In his “Notice of Appeal” dated January 5, 2002, Klinger identifies two issues for appeal:

IS the Court, Weil, J., unduly influenced by Chapter 7 trustee, Attorney Katz and the U.S. Trustee trial attorney, Attorney Mackey, and thereby prejudiced towards debtor?

Has the Court, Weil, J., failed in its obligation to protect, preserve and guarantee the debtor his Constitutional rights, privileges and immunities thereby precluding the debtor Due Process of Law?

“Notice of Appeal,” dated January 5, 2002, at 1. In his objection to the motion to dismiss and appellate brief, Klinger argues that the conversion order should be overturned because “under Chapter 7 the estate is being destroyed,” given the trustee’s attempts to collect rents and permit certain foreclosures of the properties, resulting in “absolutely nothing that would inure to the benefit of creditors.” However, Klinger has not provided the Court with sufficient information, or with a designation of contents of the record on appeal, see Section II infra, to give it a basis for concluding that there is a substantial possibility of success on the merits. Further, a debtor’s lack of credibility and findings that a debtor engaged in fraud, dishonesty, incompetence, or gross mismanagement of his affairs compels a conclusion that the debtor is not likely to succeed on the merits of his appeal. In re Altman, 230 B.R. at 19-20. In this case, it appears from the text of Judge Weil’s written decision denying a stay that this conclusion is apt.

At the May 2, 2002 hearing before this Court, Katz and Mackey also argued convincingly that a stay was not in the public interest and that other individuals would suffer substantial prejudice if a stay were entered. They demonstrated that Klinger was attempting to collect rents from his tenants after Katz had been appointed trustee, and that he tried to sell his property while the case was still under Chapter 11. They also pointed to examples of his improper use of estate funds.⁴

In light of all of these factors, the Court concludes that a stay is not appropriate in this case. Accordingly, upon reconsideration, the Court DENIES Klinger's motion for a stay of the conversion order.⁵

II. Trustee's motion to dismiss appeal [Doc. # 6]

Rule 8006 of the Federal Rules of Bankruptcy Procedure provides, in relevant part:

Within 10 days after filing the notice of appeal as provided by Rule 8001(a) . . . the appellant shall file with the clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented. . . . The record on appeal shall include the items so designated by the parties, the notice of appeal, the judgment, order or decree appealed from, and any opinion, findings of fact, and conclusions of law of the court.

Fed. R. Bankr. P. 8006. This rule is not jurisdictional and thus its time requirement may be extended by the district court. In re MacInnis, No. 98 Civ. 2894(SAS), 1998 WL 409726, at *3 (S.D.N.Y. July 21, 1998). Specifically, "on motion made after the expiration of the specified period [the court may] permit the act to be done where the failure to act was the result of

⁴They also argued that the motion for a stay is moot given that the estate already has been converted to Chapter 7.

⁵In its original ruling, the Court incorrectly referred to Rule 8007, rather than Rule 8005, as the authority for its decision, and the original ruling shall be amended to reflect this correction.

excusable neglect.” Fed. R. Bankr. P. 9006(b)(1)(2). When applying the “excusable neglect” standard, a court considers all of the relevant circumstances involved in the missed deadline, including “the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was in the reasonable control of the movant, and whether the movant acted in good faith.” Pioneer Investment Servs. Co. v. Brunswick Assocs. Ltd. P’ship, 507 U.S. 380, 395 (1993). “A pattern of delay and the absence of any reasonable excuse justify dismissal.” In re MacInnis, 1998 WL 409726, at *3.

Klinger has not filed a designation of contents of the record for appeal as required by Rule 8006. He appears to have filed a statement of issues in his “Notice of Appeal” dated January 5, 2002, a document which was not docketed but clearly submitted to the Court after the ten day time limit provided by Rule 8006 had expired. Further, although Rule 8009 provides that the appellant shall serve his appellate brief fifteen days after docketing of the notice of appeal, Klinger did not file his brief until February 11, 2002. Klinger has not filed a motion to extend any of the applicable deadlines.⁶ Nevertheless, the Court still will examine whether he has shown excusable neglect in his opposition to the trustee’s motion to dismiss and in the hearing before this Court.

At the hearing, Klinger stated that he was not cognizant of the requirements of the United States Bankruptcy Code and the Federal Rules of Bankruptcy Procedure even though the trustee’s memorandum in support of her motion to dismiss set forth the applicable filing requirements. He also explained that he believed he could not file a motion to extend the deadlines once they had passed. Although Klinger’s explanations are weak, particularly given that

⁶The trustee also contends that Klinger has not paid the requisite filing fee, though Klinger maintains that he has. The Court’s file does not contain any indication that such a fee was paid.

the trustee explained the applicable rules in her memorandum, the Court concludes that Klinger has shown excusable neglect for a pro se appellant—but barely. In particular, he does not appear to have engaged in a pattern of delay; he failed to timely file only three particular items. In re MacInnis, 1998 WL 409726, at *3. The Court orders Klinger to file the designation of the contents of the record and otherwise comply with the requirements of Rule 8006 within 10 days of the date of this ruling. Failure to do so could result in dismissal of this appeal. Accordingly, the trustee’s motion to dismiss is DENIED.

III. Conclusion

The Clerk is ordered to docket Klinger’s “Notice of Appeal” and “Motion for IMMEDIATE RELIEF,” both dated January 5, 2002, and deem them to have been filed on that date. The “Motion for IMMEDIATE RELIEF” is DENIED. Klinger’s motion for reconsideration [Doc. # 4] is GRANTED. Upon reconsideration, the motion for stay [Doc. # 3] is DENIED, though the original ruling shall be amended to reflect that Fed. R. Bankr. P. 8005 rather than Fed. R. Bankr. P. 8007, is the proper authority for its decision. The trustee’s motion to dismiss [Doc. # 6] is DENIED.

SO ORDERED this _____ day of May 2002, at Hartford, Connecticut.

CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE